

INTRODUCTION

This book is an investigation into the nature of trade and trade agreements. I am interested in the words we use to capture the meaning of trade as a human experience, and a cluster of associated words, ideas, norms and practices centered on exchanges of various kinds. In particular, this book is a reflection on what we mean by the idea of “trade” itself, and by trade’s relationship to freedom, by which I mean consent – trade as a consensual economic exchange. Finally, I am interested as a legal scholar in how trade and its relationship to consent are reflected – or not – in our understanding of “free trade,” our trade laws and in the transnational commercial relationships, both public and private, of our globalizing world today.

I A REFLECTIVE INVESTIGATION OF TRADE

My goal for this book is to say something meaningful about the nature of trade as a human experience, which I hope will help inform our understanding of the economic relationships we have built so far, and our collective decisions as to what kinds of economic relationships we want to build going forward. In this sense, my purpose is more in line with that of phenomenological writing (although this is not a work of phenomenology) than with trade law scholarship per se: to capture something essential about an experience that has implications for our practice.¹ My hope is that if we can identify what is essential to trade *as trade*, we can better understand how to facilitate, protect and enhance

¹ See Max van Manen, *Practicing Phenomenological Writing*, 2 PHENOMENOLOGY + PEDAGOGY 36, 38 (1984).

it, and thereby better understand how to promote a flourishing system of global economic relationships. In other words, I am proposing that we begin by looking at what trade *is*, and then see what trade, properly understood, *asks of us* if we are to protect and promote it – what it means, in fact, to engage in trade at all, and not something else.

Today we most often come upon the word “trade” already embedded in a phrase that is quite common and often assumed – mistakenly, as it turns out – to be well understood: “free trade.” The idea of free trade has come to mean a policy of freeing trade from government restrictions, often of a protectionist nature, that interfere with the natural patterns of exchange that private parties might otherwise establish and follow toward their own – and our collective – good.²

There is, however, much more to trade and its relationship to the word “free” than is readily captured by this conventional understanding. On closer inspection, the phrase “free trade” invokes the idea of freedom in two ways. The conventional meaning of the phrase, as mentioned, is that trade is free if it is not subject to governmental regulation that distorts it from economically efficient patterns of exchange, and that is certainly a meaningful view.

The second, less obvious resonance (think “freely traded” or “trading freely”) is that there is an element of freedom in the economic exchange itself – trade must be “free,” i.e., consensual, in order to be trade at all. In this sense, it seems that what we call trade must involve consensual exchange; it must have the consent of those involved in the trade (whether as people or as states), or else the absence of protectionist regulation is beside the point – it is not even trade anymore, but something else. Offering an account of that “something else,” and of this second kind of freedom and its relationship to what we call “trade,”³ is at the heart of this book.

² So, at least, says the theory of trade. See DOUGLAS A. IRWIN, *AGAINST THE TIDE: AN INTELLECTUAL HISTORY OF FREE TRADE* 5 (1996). Irwin offers a fascinating intellectual history of the doctrine of free trade.

³ I’ve put the word “trade” in quotes here and elsewhere at times to suggest that once we begin to investigate the nature of this complex phenomenon, it becomes apparent that we can’t always or easily be sure how the word is being used, and whether in fact it is meant to signal genuine trade, as that notion will be developed here, or a pathology of trade, as is too often the case. I am not fully consistent in this usage, but at least we are all now on notice.

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I first became interested in the relationship between trade and consent through Simone Weil's penetrating studies of consent and oppression in economic life.⁴ In her two foundational essays "Analysis of Oppression" and "*The Iliad*, Poem of Might," I discovered a fundamental insight with great resonance for the trading system today.⁵ Writing in the shadow of Fascism early in the twentieth century, Weil understood that oppressive tendencies are inherent in all forms of socioeconomic organization, that they are best resisted by protecting consent in these relationships and that one cannot seek consent where there is no power of refusal.⁶

In the *Symposium*, Plato offers one definition of justice as mutual consent.⁷ In a similar vein, Weil also writes that justice has as its object the exercise of the faculty of consent in human relations.⁸ If socioeconomic relationships are not just – understood here as consensual – then by institutionalizing them we risk gratifying what Weil terms that "shameful, unacknowledged taste for conquest which enslaves under the pretense of liberating."⁹

While the root of this violence is for Weil nature itself – "all force originates in nature"¹⁰ – oppression is more subtle: it depends first on privilege, or the position of a relative few in control over the work and the needs of many. There are many sources of privilege among people, but economic privilege comes when the need to organize into more complex forms of social organization, such as markets for the exchange

⁴ To be accurate, I was directed to Weil by my partner, the poet Kim Garcia, who in the midst of her omnivorous reading said to me one day out of the blue, "You really should read Simone Weil in connection with this trade stuff."

⁵ Indeed, with great resonance for law itself. The legal scholar James Boyd White has written an entire book of essays on law with Weil's *Iliad* essay as his departure point, to which I am much indebted. See JAMES BOYD WHITE, *LIVING SPEECH: RESISTING THE EMPIRE OF FORCE* (2006).

⁶ SIMONE WEIL, *Justice and Human Society*, in SIMONE WEIL 123–25 (Eric O. Springsted ed. 1998). This will hereinafter be referred to as *Justice and Human Society*.

⁷ "... where there is voluntary agreement, there ... is justice" (Benjamin Jowett trans.)

⁸ *Justice and Human Society*, *supra* note 6, at 125.

⁹ *Id.* at 126.

¹⁰ SIMONE WEIL, *Analysis of Oppression*, in THE SIMONE WEIL READER 126, 133 (George A. Panichas ed. 1977).

of goods or firms for the deployment of capital, places a few persons in an exclusive position of control over the system on which all depend for their livelihood.

Weil is emphatic that this understanding of oppression is not limited to capitalism, but applies to all forms of social organization:

Whenever, in the struggle against men [sic] or against nature, efforts need to be multiplied and coordinated to be effective, coordination becomes the monopoly of a few leaders as soon as it reaches a certain degree of complexity, and execution's primary law is then obedience; this is true both for the management of public affairs and for that of private undertakings ... [A]ll these factors enter into play under all systems of oppression; what changes is the way they are distributed and combined, the degree of concentration of power, and also that more or less closed and consequently more or less mysterious character of each monopoly.¹¹

The response to this fundamental dilemma of changing one form of servitude (natural) for another (social) – and there is no solution to it, in the sense of eliminating it, but only a response – is to seek to protect and promote consent in all aspects of the social order. Consent is the expression of an essential human freedom that resists and balances what Weil elsewhere calls “the empire of force” (I will be returning to this in the final chapter).¹²

Consent is thus the keystone for all efforts to resist the oppressive tendencies inherent in all forms of socioeconomic organization, including perhaps (as we shall see) the global trading system, the most extensive form of socioeconomic organization we share today. Consent is the antidote, if you will – that element within social organization that insists on maintaining human beings as ends, that keeps us human within an oppressive system, rather than objects.¹³ Otherwise, Weil

¹¹ *Analysis of Oppression*, *supra* note 10, at 134.

¹² SIMONE WEIL, *The Iliad, Poem of Might*, in *THE SIMONE WEIL READER* 181 (George A. Panichas ed. 1977). Panichas translates the phrase as “empire of might,” but I prefer James Boyd White’s translation, quoted here.

¹³ She locates this analysis in her penetrating reading of the *Iliad*: “... in this ancient and wonderful poem there already appears the essential evil besetting humanity, the substitution of means for ends.” *Analysis of Oppression*, *supra* note 10, at 138.

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writes that “the law of all activities governing social life” – I would say the tragedy of it – “is that here each one sacrifices human life – in himself and in others – to things which are only means to a better way of living.”¹⁴

This insight echoes through many dimensions of politics and economics, as well as the law, both private and public, as Weil herself understood.¹⁵ Her life ultimately proved too short for the fullest exploration of these implications, and in any event, Weil was no systematizer. Rather, her genius lay in the personal intensity of her political reflections, an instinctive sympathy for and understanding of the oppressed and the breadth of her intuitive reach. For me, the intriguing possibility opened up by Weil’s insight is that by analyzing trade’s relationship to consent, we might find both the mechanisms through which oppressive tendencies are being realized in today’s global economy and, one hopes, the pathways toward global economic freedom.

The farther I read into and reflected on trade and its relationship to consent, the more convinced I became that here was buried a forgotten key. Integrating this discovery with my twenty-five years of teaching and writing about international trade law has led me to the conclusion that the absence, or impingement, of consent is at the root of the numerous pathologies of trade that today complicate both transnational “trade” relations and the domestic politics of “trade.” Simply put, it is the presence of consent, even when cabined by economic pressures and necessities, that renders an exchange “trade.” When consent leaves the room, so to speak, trade goes with it, no matter how papered over any subsequent “agreement” might be by

¹⁴ *Analysis of Oppression*, *supra* note 10, at 138.

¹⁵ For this reason Weil has been called the “philosopher of oppression.” See ADRIENNE RICH, *For a Friend in Travail*, in *AN ATLAS OF THE DIFFICULT WORLD: POEMS 1988–1991*, at 51 (1991). (“What are you going through? she said, is the great question. / Philosopher of oppression, theorist/ of the victories of force.”) “She” being Weil, who wrote, “The love of our neighbor in all its fullness simply means being able to say to him: ‘What are you going through?’” See SIMONE WEIL, *WAITING FOR GOD* 115 (1959). It has fallen to others to explore the many structural implications of her work through law, humanities and the arts, and Weil studies are undergoing something of a renaissance today. See, e.g., Oche Onazi, *Justice Dictated by the Surfeit of Love: Simone Weil in Nigeria*, 28 *LAW & CRITIQUE* 1 (2017); KAIJA SAARIAHO & AMIN MAALOUF, *LA PASSION DE SIMONE* (Barbican Centre, Los Angeles Philharmonic and Lincoln Center for the Performing Arts 2006).

legal formalities, which only serve to make appear as trade what is really something else: coercion, exploitation or worse.

This means that in order to understand how a globalizing economy can at the same time be both an oppressive weight on human freedom, and a progressive force for human flourishing, we need to take a closer look at how consent fares in international trade law, and international economic law more generally. Weil's account highlights the futility of creating alternative futures or economic systems – capitalist or Marxist – that do not directly confront through consent the oppressive tendencies of any form of social organization.¹⁶ Instead, a consensual engagement in social organization is itself the way forward, turning the necessity of social organization itself into an expression of the flourishing of human nature. Weil expresses this paradox most trenchantly as follows: “This world is the closed door. It is a barrier. And at the same time, it is the way through.”¹⁷

The key to “the way through” is to closely analyze the mechanisms of oppression involved in any specific form or aspect of social organization.

The problem is, in short, to know what it is that links oppression in general and each form of oppression in particular to the system of production: in other words, to succeed in grasping the mechanism of oppression, in understanding by what means it arises, subsists, transforms itself, by what means, perhaps, it might theoretically disappear.¹⁸

In this passage, Weil articulates, in her characteristically urgent style, the rationale for the consent analysis of trade I offer here. Insofar as the global economy is the system of production that all human beings on the planet find themselves to one degree or another subject to, it is this

¹⁶ Although Weil rejected Marx's prescription, his mode of analysis remained central to her project: “If Marx's system, in its broad outlines, is of little assistance, it is a different matter when it comes to the analyses he was led to make by the concrete study of capitalism, and in which, while believing that he was limiting himself to describing a system, he probably more than once seized upon the hidden nature of oppression itself.” *Analysis of Oppression*, *supra* note 10, at 131. See generally LAWRENCE A. BLUM & VICTOR SEIDLER, *A TRUER LIBERTY: SIMONE WEIL AND MARXISM* (2009).

¹⁷ SIMONE WEIL, *GRAVITY AND GRACE* 145 (1952).

¹⁸ *Analysis of Oppression*, *supra* note 10, at 126.

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structure that we must analyze if we are to know the links between oppression in general and the oppressiveness of the global economy in particular, and it is this same structure, suitably reformed, which we must also rely on to safeguard consent: it is both the closed door, and the way through.

Weil reminds us that the analysis of oppression must be tailored to the specific “instruments” of power deployed in a given area of social life, for after all “you do not command in the same way, by means of soldiers with bows and arrows, spears and swords, as you do by . . . exchanges in economic life.”¹⁹ Trade agreements and trade negotiations are their own unique instrument of power, and therefore at the heart of any analysis of the nature of the global economic relationships we are building through trade.

In her own work, Weil outlines an approach to this task – to the analysis of specific instruments of oppression and injustice – that she believes will result in the kind of clarity about and resistance to oppression that she advocates:

It would be necessary first of all to define by way of an ideal limit the objective conditions that would permit of a social organization absolutely free from oppression; then seek out by what means and to what extent the conditions actually given can be transformed so as to bring them nearer to this ideal; find out what is the least oppressive form of social organization for a body of specific objective conditions; and lastly, define in this field the power of action and responsibilities of individuals as such.²⁰

In other words, this must be a deeply contextual inquiry – a simple analysis of oppression in general will not unlock the oppressive nature of particular social systems. For that one needs a detailed analysis of the specific conditions within which a social system operates. Similarly, the phenomenon of consent may not look the same in all circumstances: “[t]he forms and expressions of consent vary greatly in different traditions and milieu.”²¹

¹⁹ *Analysis of Oppression*, *supra* note 10, at 141.

²⁰ *Id.* at 130.

²¹ *Justice and Human Society*, *supra* note 6, at 126.

Therefore, in order to understand the oppressive tendencies inherent in the global economy today, we need to understand the consensual and nonconsensual elements within contemporary trade agreements and how they are negotiated. Through these agreements we are building the world, and as such these agreements are both the closed door, and the way through. However, before embarking on this study, I think it would be helpful to first look briefly at how consent is understood in other fields, sometimes in line with Weil's insight, and sometimes not.

III CONSENT IN OTHER FIELDS

The role of consent in human social behavior, law and politics is of course a vast and fundamental inquiry that touches many areas of concern and opens many possibilities, only some of which I can hope to address here. As James Boyd White reminds us, when the human mind meets and tries to use the language that surrounds it in responding to the world, a rich array of intellectual, ethical and political commitments are at work.²²

Expressions of consent can play a constitutive role in everything from who we share our lunch with, and who we take as romantic partners or life partners, to who we choose to govern us, the economic bargains that we make or reject, and the laws that frame what bargains we *can* make and how; in short, the entire system of social, economic, political and legal relationships we are born into and at least implicitly presented with as a choice.

Political consent is of course a cornerstone of liberalism and democratic theory generally, with an illustrious history dating back at least to Socrates in Plato's *Crito*.²³ Within liberalism we continue to maintain that consent plays a normative role as the basis of the domestic legal order, at least in the social contract model of liberal societies, despite

²² WHITE, *supra* note 5.

²³ Consent has ancient roots. See generally TOM O'SHEA, CONSENT IN HISTORY, THEORY AND PRACTICE 1–11 (2011), <https://autonomy.essex.ac.uk/wp-content/uploads/2016/11/Consent-GPR-June-2012.pdf>. Last accessed June 5, 2018.

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challenging theoretical critiques of consent theory.²⁴ Consent also features prominently in global political theory, for example in the work of David Held, in which consent is the third of four core cosmopolitan principles.²⁵

Political consent can have a theoretical as well as pragmatic role. For example, Brian Barry suggests that we ask of any rule or principle if it would emerge from a negotiation involving equality and freedom.²⁶ Implicit in this formulation is the expectation that it be a rule or principle freely consented to, since we assume that to be the outcome of negotiations involving equality and freedom. Similarly, John Rawls's famous "original position" can also be seen as an exercise to invoke our notions of consent: under the conditions he prescribes, what principles of justice would we consent to?²⁷ Scanlon, by contrast, could be said to invoke the other side of consent, namely, what principles would we have reasonable grounds to reject?²⁸

As with political theory, there is an extensive literature on the many roles that consent plays in the law.²⁹ Consent plays a key doctrinal role within many specific substantive bodies of law, in which a series of consequences to one's life and liberty depend upon a determination of consent as defined by the law.³⁰ For example, Beyleveld and Brownsword open their comprehensive analysis of consent across many fields of law with an illustration of the changing law of consent in marital sexual relations. Under the early English common law, consent on the part of the wife was presumed in law by the state of marriage itself, a legal construction we now reject. Growing in part from these troubled roots, the modern criminal law of

²⁴ See generally RICHARD DAGGER & DAVID LEFKOWITZ, *Political Obligation*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Aug. 7, 2014), <https://plato.stanford.edu/archives/fall2014/entries/political-obligation/> (last accessed June 5, 2018).

²⁵ David Held, *Cosmopolitanism: Globalisation Tamed*, 29 REV. INT'L STUD. 465, 470–71 (2003).

²⁶ BRIAN BARRY, THEORIES OF JUSTICE 343 (1989).

²⁷ JOHN RAWLS, A THEORY OF JUSTICE 17 (1971).

²⁸ See T. M. SCANLON, WHAT WE OWE EACH OTHER (1998).

²⁹ See generally DERYCK BEYLEVELD & ROGER BROWNSWORD, CONSENT IN THE LAW (2007) (reviewing this literature and analyzing the role of consent in public and private law).

³⁰ *Id.* at 1–2.

sexual relations now depends fundamentally on a careful examination of consent in all its complex forms and degrees.³¹

This analogy to marriage in early common law also illustrates the relationship in law between consent, power and inequality that is a subject of this book as well. It can be said to be axiomatic of human behavior, at least as understood through law, that inequalities in power often lead to infringements of consent.³² Law plays a key role in creating, reinforcing or masking this relationship, but can play an equally key role in unmasking and transforming it as well – both the closed door and the way through.³³

The notion of consent also plays an important role in international law, quite relevant for us here since trade agreements are legal instruments under international law. In international law, consent is a formal principle of legitimacy and a necessary element in the creation of legally binding obligations.³⁴ Without consent, international law would be an imperial order and not a legal order in the Westphalian sense.³⁵ In fact, as the International Court of Justice has pointed out, consent is at the heart of international law, at least with respect to its formal indicia (treaty ratification, for example, or state decisions as reflective of state practice).³⁶ There are, however, significant limits to the power of such a doctrine of formal consent when it comes to safeguarding

³¹ So does the law of contract, which has also had a complex relationship to the question of consent under conditions of inequality, in particular with respect to gender. See Fiona Smith, *Book Review*, 2 INT'L J.L. CONTEXT 419 (2006) (reviewing FEMINIST PERSPECTIVES ON CONTRACT LAW [Linda Mulcahy & Sally Wheeler eds. 2005]). I shall have more to say about contracts in Chapter 1.

³² Certainly, Weil would have said so. See *supra* note 10 and accompanying text.

³³ See BEYLEVELD & BROWNSWORD, *supra* note 29. The common law's evolution with respect to consent in marital sexual relations also illustrates law's capacity for reform as our understanding changes.

³⁴ For an overview of consent in international relations and the role of consent as a legitimizing factor in international law, see DAVID LEFKOWITZ, *The Legitimacy of International Law*, in GLOBAL POLITICAL THEORY 78 (David Held & Pietro Maffettone eds. 2016).

³⁵ Of course, there are many who claim that modern international law is an imperial order, despite the formal role of consent, for reasons that are quite relevant to the subject of this book. See, e.g., B. S. Chimni, *International Institutions Today: An Imperial State in the Making*, 15 EUR. J. INT'L L. 1 (2004). I shall have more to say about this throughout the book.

³⁶ See Chios Carmody, *Theory and Theoretical Approaches to WTO Law*, 13 MANCHESTER J. INT'L ECON. L. 152, 154–55 (2016) (discussing the *Maritime Delimitation* case).